80-1204, 80-5862

In The

Supreme Court of the United States

October Term, 1980

—o—

No. 80-1204

C. MICHAEL ANDERSON,

Petitioner,

vs.

STATE OF NEBRASKA,

Respondent.

No. 80-5862

PETER HOCHSTEIN,

Petitioner,

vs.

STATE OF NEBRASKA

Respondent.

—o—

BRIEF OF RESPONDENT IN OPPOSITION TO PETITIONS FOR CERTIORARI

—o—

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QUESTIONS FOR REVIEW

1. Should the testimony of a live witness be suppressed when the movant has failed to affirmatively show he was obtained as a result of an illegal wiretap?

2. Does the Nebraska death penalty meet United States constitutional requirements?

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SUMMARY OF ARGUMENT

I.

The Testimony of Witness Reams Was Admissible.

A. The petitioners produced no direct evidence from illegal wiretaps made by private investigator Whelan that was shown to have helped locate witness Reams as a witness for the prosecution or influenced his testimony. The police knew about witness Reams' social and business con-

nections with the petitioners early in the case and before the illegal wiretaps were made by Whelan. When Whelan was hired by the family of the deceased the name of Reams was given to him by the family as a person to investigate.

Whelan was able to influence Reams to testify by promises and bluff unrelated to any actual wiretap reception. Therefore, petitioners have failed to show that this is even a "fruit of the poison tree" case at all; it is, instead, a case of a private investigator, with tenacity, suspicion, and information picked up from various sources, all of which were legal, lucking into a solution of the case.

B. Even if it is assumed that the illegal wiretaps by Whelan gave him some information, which has never been produced, which led him to Reams as a prosecution witness, the balancing tests set forth in *United States v. Ceccolini* lead to the inescapable conclusion that any taint has been attenuated and that Reams, as a live witness, was properly permitted to testify.

II.

The Exclusion of the Juror Was Proper.

The Nebraska death penalty gives the jury no recommendation or influence on the penalty. The penalty is imposed by the court after considering aggravating and mitigating circumstances. *Witherspoon v. Illinois* is therefore inapplicable. Despite the fact that *Witherspoon* is directed to a jury which imposes or recommends the death penalty, the requirements were sufficiently met in this case by the district court who conducted a thorough examination of the juror after she expressed concern about being able to reach a verdict of guilty or not guilty.

III.

Constitutionality of the Nebraska Death Penalty.

The Nebraska Supreme Court has thoroughly examined the Nebraska death penalty in light of recent United States Supreme Court decisions and found it to be constitutionally proper in light of those decisions.

IV.

The Comparative Review of Death Sentences Imposed Under the Nebraska Death Penalty.

The Nebraska Supreme Court has reasonably interpreted the Nebraska statute which required it to make an examination of the sentences imposed in homicide cases and has made a thorough review of such cases. Prior to said requirement being statutory, the Nebraska Supreme Court also made a thorough review of such cases on its own. The petitioners received a meaningful review of their death sentences in this case and in light of previous cases.

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ARGUMENT

I.

The testimony of Lon Reams was admissible at the petitioners' trial.

The main issue in these petitions for certiorari is whether witness Lon Reams' testimony against the petitioners should have been suppressed at trial. The petitioners argue at length that the testimony was "fruit of

the poisoned tree" and should have been suppressed. Their basic contention is that the testimony of Reams was "tainted" by the concededly illegal Whelan wiretaps and should have been excluded as evidence directly derived from the illegal wiretaps. They further assert that the state failed to show an independent source for the testimony of Reams.

This issue was first addressed by Judge Hale McCown of the Nebraska Supreme Court. Prior to trial, the petitioners filed a motion to suppress the testimony of Lon Reams and other evidence. The district court granted the motion to suppress all wiretap related evidence and testimony. The state then exercised its statutory right to appeal that ruling to the Nebraska Supreme Court pursuant to Neb. Rev. Stat. § 29-824 (Reissue 1979). Thereupon, Judge McCown reversed that part of the ruling of the district court suppressing the testimony of Reams and found that such testimony was admissible. We submit, as hereinafter discussed, that Judge McCown's ruling, and the subsequent affirmance of the Supreme Court of Nebraska, were correct.

The principal issue addressed by Judge McCown in an unpublished opinion was whether or not Lon Reams could testify as a witness at the trial of the petitioners. Judge McCown first found that the statutory exclusionary rule, Neb. Rev. Stat. § 86-712 (Reissue 1976), combines "with the judicially imposed exclusionary rule under the Fourth Amendment to pose the problem of whether Lon Reams' testimony as a witness is derived from, or the evidentiary product of, the illegal Whelan wiretaps." Judge McCown then discussed the issue of whether or not the

testimony of a living witness should be suppressed as the evidentiary fruit of the poisoned tree of illegal wiretapping.

After analyzing this issue, Judge McCown concluded in part as follows:

> In the present case the unlawful conduct was the conduct of a private individual and not that of a law enforcement officer. In terms of causation, the activities of the private individual and the activities of the law enforcement officers were independent of each other. The present case does not involve the usual situation in which the name or identity of a witness is obtained only by reason of the unlawful activity. Here the record shows that police officers, in the course of their investigation of the Abboud murder, interviewed Lon Reams on three different occasions between November 10, 1975, and June 29, 1976. The police knew as well as Whelan did that Reams had a social relationship with both Anderson and Hochstein, as well as a business relationship with Anderson. *The evidence fails to demonstrate that the illegal wiretaps revealed any new information about Reams' involvement, but only suspicion supplied by the assumptions, speculation, and conjecture of Whelan.*

(Emphasis added.)

The application of the "attenuation doctrine" to in-court testimony of witnesses located as a result of an illegal search was recently addressed by the United States Supreme Court in *United States v. Ceccolini,* 435 U. S. 268, 55 L. Ed. 2d 268, 98 S. Ct. 1054 (1978). Prior to the *Ceccolini* decision, application of the exclusionary rule to in-court testimony of witnesses was unclear. However, the *Ceccolini* decision clarifies this area of law and provides express standards for the application of the exclu-

sionary rule to live-witness testimony. The *Ceccolini* decision was rendered subsequent to Judge McCown's finding that Reams' testimony was admissible.

As Judge McCown's opinion indicates, prior to the *Ceccolini* decision there was a divergence of opinion as to whether or not a *per se* rule existed that the testimony of a live witness should be allowed at trial no matter how close and proximate the connection between the witness and a violation of the Fourth Amendment. The *Ceccolini* decision rejected a *per se* admissibility rule of such testimony in favor of a balancing test. It is under this balancing test that we must analyze whether witness Reams' testimony was admissible at the defendants' trial.

Justice Rehnquist in *United States v. Ceccolini,* 435 U. S. 268, 55 L. Ed. 2d 268, 98 S. Ct. 1054 (1978), announced several factors which are relevant to the application of the exclusionary rule to live-witness testimony. These factors are summarized below:

(1) The degree of free will exercised by the witness;

(2) Whether the illegally seized evidence was used in questioning the witness;

(3) The amount of time which elapsed between the time of the illegal search and the initial contact with the witness, on the one hand, and between the testimony at trial on the other;

(4) Whether the witness's identity and relationship with the party on trial was known by the police prior to the discovery of the illegally seized evidence;

(5) Whether the illegal activity was entered into by law enforcement officers with the intent to find tangible evidence or to find a willing and knowledgeable witness to testify; and

(6) Whether the application of the exclusionary rule in a particular situation would have any deterrent effect on the behavior of law enforcement officers.

Applying the multifactor attenuation analysis announced by the Court in *Ceccolini* to the facts present in this appeal leads to the inescapable conclusion that Reams' testimony was admissible against the petitioners. However, prior to a discussion of these factors relative to the case at bar, an important point previously made, needs to be re-emphasized. This point is relevant to each factor required to be considered under *Ceccolini.* The avowed purpose of the exclusionary rule, whether statutorily or judicially created, is to deter future unlawful police conduct. As Judge McCown found, in the present case the unlawful conduct was that of a private individual and *not* that of a law enforcement officer. The activities of the private individual and the law enforcement officers were independent of each other. Once again, as Judge McCown so aptly stated, "[t]o apply the exclusionary rule against the State on the record here would misdirect the deterrent effect of the rule."

With the above point constantly in mind, we turn to a discussion of the facts in this case under the principles announced in *Ceccolini.* The first attenuating factor cited in *Ceccolini* concerns the degree of volition exercised by the witness in deciding to testify. The petitioners argue that because of Whelan's involvement in trying to convince Reams to testify that the decision to testify was not an exercise of free will. As in *Ceccolini,* the evidence in this case indicates overwhelmingly that Reams' testimony was in no way coerced or induced by official authority. From the point of view of the state, Reams' decision to

testify was completely voluntary and not coerced by any official government action. This conclusion is supported in *Ceccolini* where the Court stated:

> Witnesses can, and often do, come forward and offer evidence entirely of their own volition. And evaluated properly, the degree of free will necessary to dissipate the taint will very likely be found more often in the case of live-witness testimony than other kinds of evidence. *The time, place and manner of the initial questioning of the witness may be such that any statements are truly the product of detached reflection and a desire to be cooperative on the part of the witness. And the illegality which led to the discovery of the witness very often will not play any meaningful part in the witness' willingness to testify.*

(Emphasis added.) *Id.* at 276, 277.

From the point of view of the state, the record reveals a number of volitionary acts on the part of Reams: (1) After discussions with Whelan, Reams met with Deputy County Attorney Cooper to discuss the case, at which he denied involvement (122:12)[1]; and (2) later, after consulting his attorney and further discussions with Whelan, he agreed to testify. The totality of the circumstance shows that Reams, after pondering the consequences of his action, voluntarily and with a proffer of immunity (no small matter), agreed to testify. The petitioners argue that Reams was coerced by Whelan into agreeing to testify. However, coercion, if any were applied in the present case, was that of a private individual and not that of the state. Any time a witness comes forward to testify,

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1 References are to state court testimony known in Nebraska as bill of exceptions.

such action may be the result of coercion by parents, spouse, church or other unofficial segments of society; this is not the kind of interference with the exercise of free will the United States Supreme Court had reference to. In fact, the active interest and cooperation of society is absolutely necessary to the operation of government by law.

Even considering Whelan's illegal conduct, there is no connection with the securing of Reams' testimony! Whelan's bluff or lucky shot to Reams' fear or conscience was not illegal; and as Judge McCown aptly observed in his opinion in this case: "Unless an offer of immunity to a known witness by the government constitutes an improper exploitation of any previous illegal activity by a private individual, the actions of the prosecution in this case with respect to Reams were neither illegal nor improper." What was the illegal activity? It was the wiretaps. Whelan testified several times that he got no information on Reams from the wiretaps (207:19; 286:1, 20; 287:2) nor did he reveal any wiretap information to Reams (287:5-8). Contrary to the statements in the petitions indicating that Whelan had taped conversations showing Reams' involvement in the Abboud murder and told Reams so, nothing in the tapes connects anyone—they are worthless as evidence.

The Supreme Court of Nebraska found from the evidence:

> The record establishes the fact that nothing heard during the illegal wiretap led the State to Reams. Exhibit 43 best illustrates this fact. Exhibit 43 is a report made by Whelan to the Abboud family and reads, in part:

"Monday, 6-13-77

"Talked with Cooper, aware of Lon's whereabouts. Cooper still thinks Lon was not involved but knows what happened. We decided that Mila and I should talk with Lon and make a deal.

". . . Lon had been at her home all week-end and was acting very nervous, upset over something. Plan decided on: Mila is to talk with Reams this afternoon and tell him of her involvement with me and that the case is coming down with Reams as a conspirator; he will be charged with murder. Also, it is now known that Anderson, Pete and Leo are going to kill Lon. Mila also believed this and was placed in the middle. Both had to make a decision—Reams arrested or Reams killed. Mila agreed to talk with Lon and go for the confession. She agreed to give Lon enough information so that he would believe that he had no out and that Cooper had enough for the arrest."

Of course, none of the "facts" to be related to Reams were true and were not obtained as a result of any illegal wiretap.

We, therefore, conclude that the identity of Reams was made known to the State by independent means and was not the sole result of an illegal wiretap. It was, therefore, not the fruit of a poisonous tree and it was not error for the court to permit Reams' live testimony to be admitted into evidence.

State v. Anderson and Hochstein, 207 Neb. 61, 62, 296 N. W. 2d 440, 448 (1980).

The second attenuating factor discussed in *Ceccolini* is whether the illegal seized evidence was used in questioning the witness. The record indicates that the illegally seized evidence, which was in fact suppressed by both the trial court and Judge McCown, was not used in questioning Reams at trial. The petitioners argue that the illegal

conduct, specifically Whelan's wiretaps, were the primary lever securing Reams' testimony; but Whelan discovered no concrete evidence from the wiretaps. He could have used the same bluff on Reams if he had never made a wiretap. Once again, if there was any exploitation of the illegal evidence, it was that of a private individual, and not that of any law enforcement officer, and that based solely on assumptions and speculation.

A third factor to take into account is the amount of time which elapsed between the time of the illegal search and the initial contact with the witness, on the one hand, and between the testimony at trial, on the other. The petitioners contend that unlike *Ceccolini,* where four months elapsed between the illegality and the decision to testify, the influence of the illegal wiretaps pervaded the entire period between the initial illegality and Reams' decision to testify. This argument ignores the fact, as discussed later, that the police had already interviewed Reams prior to Whelan's activities (E9). In addition, the period of time between Whelan's illegal activities and the witness' testimony at trial was over a year.

A fourth attenuating factor concerns whether the witness' identity and relationship with the petitioners were known to the police before the illegal conduct. The petitioners argue that the police had absolutely no reason prior to the wiretaps to believe Reams was in any way involved in or knew about the Abboud murder. However, the record in this case shows conclusively that police officers, in the course of their investigation, interviewed Reams three different times prior to the illegal conduct (T44). The police knew a few days after the murder that Reams, along

with petitioner Anderson's wife, heard Anderson correctly predict that Abboud was going to be hit in the next two weeks (301:12). This was seven months before Whelan even entered the case. Thus, the police were well aware of Reams and his relationship with the petitioner. The record reflects that the police knew that Reams had a social relationship with both petitioners Anderson and Hochstein, and a business relationship with petitioner Anderson. As Judge McCown stated, ". . . [t]he evidence fails to demonstrate that the illegal wiretaps revealed any new information about Reams' involvement, but only suspicion supplied by the assumptions, speculations, and conjecture of Whelan."

A fifth factor of relevance in gauging attenuation is the purpose and flagrancy of the official misconduct involved. Also see, *Brown v. Illinois*, 422 U. S. 590, 45 L. Ed. 2d 416, 95 S. Ct. 2254 (1975). Related to this factor is the sixth criteria which concerns whether the application of the exclusionary rule would have any deterrent effect to law enforcement officers. The petitioners argue that Whelan specifically and intentionally initiated the wiretaps for the purpose of finding evidence to convict the petitioners. We must emphasize that in the present case we are not dealing with official government misconduct; instead, we are faced with illegal conduct by a private individual in no way sanctioned by the state.

In *Ceccolini* the Court concluded that application of the exclusionary rule could not have the slightest deterrent effect because there was no evidence to suggest that the officer initiated the search with the intent to find tangible evidence of a witness. Similarly, the suppression of

Reams' testimony in this case would have no deterrent effect on the state for the reason that any illegal conduct in this case was that of a private individual. The social cost of permanently silencing Reams would be "too great for an evenhanded system of law enforcement to bear in order to secure such a speculative and very likely negligible deterrent effect." 435 U. S. at 280.

When Whelan was retained by the Abbouds in June of 1976 the name of Lon Reams was given to him as a possible suspect, along with the names of Anderson and Hochstein.

Whelan has testified that he essentially divided his investigation into three phases, the first being a check on the backgrounds of the potential suspects and surveillance on them. It was through this phase that his suspicions began to focus upon Reams as being involved.

Whelan testified at the suppression hearing, referring to the wiretaps, as follows:

Q. Did you obtain any information with respect to Mr. Reams?

A. I don't think so, no.

Q. Did you reveal any of the conversations off that wiretap to Mr. Reams?

A. No, sir.

Q. Did you ever at any time play any of the conversation to Mr. Reams?

A. Never.

Q. And you testified that you implied to Mila and to Lon Reams that he was in danger?

A. I implied that, yes, to Lon and Mila.

Q. In danger from what?

A. In danger from his associates.

Q. Did you have any factual basis for that?

A. No, sir. All I was trying to do was play on his own paranoia at the time. (287:1-15).

Q. (By Mr. Cooper) Where did you get the information that you presented to Lon Reams when you talked to him on the 13th; what was the basis for that?

A. From Mila Jorgensen or Dickman, and following him.

Q. Okay.

A. I can't say from following him. I would have to say that a lot of it was made up. I was bluffing him. What information was true was what I gained from Mila.

Q. Now, you testified that I didn't authorize you to grant immunity to anybody. That is correct, isn't it?

A. That is correct.

Q. But it was also clear from our conversation that that was the intent if Mr. Reams was to come forward, wasn't it?

A. That was what I drew from it.

Q. And that's basically what you told Mr. Reams, wasn't it?

A. I told him that I thought he should get a lawyer and, through the lawyer, make a deal for immunity. (288:3-20).

We respectfully submit that from a legal standpoint the circumstances resulting in Reams becoming a state's witness are no more improper than if he had turned him-

self in as the result of urging after confession with his priest or consultation with his lawyer—which, in fact, occurred.

II.

The District Court's examination and exclusion of a juror during voir dire was proper in all respects.

The petitioners argue that the district court erred in not granting a request for a mistrial based upon the prosecution's "death qualifying" the jury panel. In particular, they assert that a juror was excluded because of conscientious scruples concerning the death penalty and that the constitutionally mandated examination by the district court in conformity with *Witherspoon v. Illinois*, 391 U. S. 510, 20 L. Ed. 2d 776, 88 S. Ct. 1770 (1968), was not undertaken.

According to the record, one of the members of the jury panel, during the voir dire examination of the prosecution, stated that she did not believe in capital punishment. She was then asked whether that fact would color her judgment in reaching a verdict of guilty or not guilty. She responded that "[I]t might." The district court then further inquired as to whether or not she felt that way to such a degree that it would affect her deliberations on the question of guilt or innocence. The district court concluded from such examination that it would influence her determination of the factual question of guilt or innocence (Vol. VII, 330:14; 331:11). The district court subsequently denied the petitioners' motion for mistrial on this issue (Vol. VII, 334:6-14).

In *Witherspoon, supra,* the Supreme Court stated that:

> [W]e hold that a sentence of death cannot be carried out if the jury that *imposed or recommended it* was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected.

(Emphasis added.)

According to *Witherspoon,* unless a venireman, where the jury influences the penalty, is irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that may be presented at the trial, he cannot be excluded.

The petitioners' reliance on *Witherspoon* is obviously misplaced. In *Witherspoon,* the jury had two distinct responsibilities: first, to determine whether the accused was innocent or guilty; and second, if guilty, to determine whether his sentence should be imprisonment or death. Contrarily, in Nebraska, juries have only the first responsibility. Juries have nothing to do with punishment of defendants in the event they find them guilty. Sentencing is specifically reserved for the courts. Neb. Rev. Stat. § 29-2519, et seq. (Reissue 1979).

Despite the fact that *Witherspoon* is factually dissimilar to the case at bar, the district court did in fact satisfy the requirements of *Witherspoon* in excluding the particular juror in this case. According to the record, the district court conducted an examination of the juror after she expressed concern about being able to reach a

verdict of guilty or not guilty. After this examination, the district court concluded that her views on capital punishment would influence her determination of guilt or innocence. The record further reflects that the district court excluded the juror for the reason that she said her personal feeling would affect her judgment on what she should decide (Vol. VII, 334:6-14). A review of the record conclusively establishes that the district court's examination and exclusion of the juror were in full compliance with *Witherspoon.*

III.

The death Penalty in Nebraska does not violate the United States Constitution.

The Nebraska Supreme Court in this case and in prior decisions has made clear that Nebraska's death penalty statutes do not violate the Constitution of the United States. *State v. Stewart,* 197 Neb. 497, 250 N. W. 2d 849 (1977); *State v. Rust,* 197 Neb. 528, 250 N. W. 2d 867 (1977); *State v. Holtan,* 197 Neb. 544, 250 N. W. 2d 876 (1977); *State v. Simants,* 197 Neb. 549, 250 N. W. 2d 881 (1977), vacated on other grounds; *Simants v. State,* 202 Neb. 828, 277 N. W. 2d 217 (1979); *State v. Williams* 205 Neb. 56, 287 N. W. 2d 18 (1979); and *State v. Otey,* 205 Neb. 90, 287 N. W. 2d 36 (1979).

When Neb. Rev. Stat. § 29-2523 (Reissue 1979) is read in its proper context—together with Neb. Rev. Stat. § 29-2521 (Reissue 1979)—the fallacy of petitioners' arguments are evident. Section 29-2521 says the court may consider evidence as to any matter relevant to sentence. Furthermore, the statute says this evidence "shall in-

clude" matters relating to the aggravating and mitigating factors listed in section 29-2523. With regard to the presentation and receipt of evidence at sentencing proceedings, this is the only mandatory language to be found in section 29-2521. In other words, the court is required to include in its sentencing deliberations consideration of evidence relating to the aggravating and mitigating circumstances enumerated in section 29-2523. Nowhere in the sentencing provisions is there any indication that the sentencing court must disregard factors which are not found in the section 29-2523 (2) listing. In fact, the language of the statutes reveal the opposite legisative intent. The sentencer is *not* directed to consider section 29-2523 factors to the exclusion of all other circumstances. Rather, the court is directed by section 29-2521 to consider any matter relevant to sentence, and to receive any evidence of probative value.

Second, the petitioners' argument is contrary to the interpretation of the sentencing statutes adopted by this court in *State v. Holtan,* 205 Neb. 314, 287 N. W. 2d 761 (1980). In *Holtan* this court was presented with an argument almost identical to the one advanced here. The court observed:

> Defendant claims that section 29-2523 is in violation of the United States Constitution in that it does not permit the court to consider all matters relevant to mitigation as required by both the Lockett and Bell decisions. In this respect, we believe the defendant reads the statute incorrectly. The statute, section 29-2523, sets out specific aggravating and mitigating circumstances. The trial court was correct in concluding that the matter concerning the aiding of the prisoner did not specifically fall within one of the

mitigating circumstances. Nevertheless, section 29-2521, R. R. S. 1943, specifically provides that in the proceeding for determination of sentence, evidence may be presented as to any matter that the court deems relevant to sentence. The statute further provides, "Any such evidence which the court deems to have probative value may be received." All the sections must be read together. In this case the evidence sought to be introduced by the defendant was received. The court did consider the evidence even though it was not a mitigating circumstance within the meaning of the statute. It concluded that the offered fact was not of such weight as to cause the court to refrain from imposing the death sentence.

The United States Supreme Court in Lockett v. Ohio, *supra,* said: "[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be *precluded* from considering as a mitigating factor, any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (Emphasis supplied.) Nothing in our statute precludes the court from considering *all* aspects of the defendant's character. To the extent there may be any question we now hold that the trial court shall, in addition to considering the aggravating and mitigating circumstances set forth in section 29-2523, R. R. S. 1943, likewise consider any matter relevant to the imposition of the sentence and receive any such evidence which the court deems to have probative value as to the character of the defendant and shall consider them as a mitigating factor though not specifically a mitigating *circumstance* as set forth in section 29-2523.

Id. at 317-319, 287 N. W. 2d at 674.

The petitioners' argument on this point is contrary to both the plain language of the statutes in question and the decided cases. The assertion that Nebraska's

death penalty statutes limit the mitigating circumstances which may be considered is without merit and should be rejected.

IV.

The comparative review of death sentences implemented by the Nebraska Supreme Court pursuant to its own policies and to LB 711, Laws 1978, Sections 29-2521.01 through 29-2521.04, 29-2522 (3) (Supp. 1978), complies with all provisions of the Federal and State Constitutions.

LB 711 was enacted by the 1978 Nebraska Legislature in an effort to assure that the death penalty never be imposed arbitrarily or disproportionately. In this legislation, now codified as Neb. Rev. Stat. §§ 29-2521.01 through 29-2521.04, 29-2522(3) (Reissue 1979), the Unicameral sought to impose guidelines for the court's review of homicide cases involving the death penalty. The petitioners argue that the provisions of LB 711 are so vague and indefinite as to amount to a violation of due process, the right to counsel, and the prohibition of cruel and unusual punishment.

In *State v. Williams,* 205 Neb. 56, 287 N. W. 2d 18 (1979), the proper construction and application of LB 711 was specifically addressed and decided by the court. First, the court held:

> In the context of Chapter 29, article 25, the word "sentence" in section 29-2521.03, R. S. Supp., 1978, is construed to mean a sentence of death, and the provisions of that section directing the determination by the Supreme Court of the propriety of a "sentence" by comparison with previous cases are applicable

> only in a case where a sentence of death has been imposed.

Id. at 74-75, 287 N. W. 2d at 28.

The holding in *Williams* provides the definition of those cases to which the special sentence review provisions apply. Pursuant to that definition, the court has identified those cases which are included in the comparative review pool. *Id.* at 77-78, 287 N. W. 2d at 29 (Addendum to the court's opinion.) The material pertinent to the comparative review—particularly the aggravating and mitigating circumstances in each case—can be found in the reported opinions cited in the Addendum to the *Williams* opinion. Thus, the petitioners' assertion that the information necessary to carry out a meaningful comparative review is unavailable is clearly incorrect. Second, petitioners' assertion that an attorney can only guess at the actual application of the law to his client has no validity in light of the construction given LB 711 in *Williams*.

Finally, regardless of the petitioners' assertions concerning LB 711, their contention that there are constitutional defects in the court's review of death penalty cases is meritless. Long before enactment of LB 711, the court had implemented its own policy of comparative review in capital cases. That policy clearly satisfies the requirement of "meaningful appellate review . . . to assure that death sentences are not imposed capriciously or in a freakish manner." *Gregg v. Georgia,* 428 U. S 153, 195, 49 L. Ed. 2d 859 887, 96 S. Ct. 2909, 2935 (1976). The court's review complied with *Gregg* even before LB 711. Thus, in *State v. Simants,* 197 Neb. 549, 250 N. W. 2d 881 (1977), it was said:

> The Supreme Court has indicated in its opinions that meaningful appellate review may be required to insure that the death penalty is not applied in an arbitrary or capricious manner. . . . [T]his court, in every case under the new statute, will perform its function of death sentence review with a maximum of rationality and consistency. . . . [E]very capital case where there can be the slightest question will be considered in comparison with other capital cases. In other words, we will compare each capital case under review with those previous cases in which the death penalty has or has not been imposed under the new statute. By this means review by this court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case.

Id. at 563-564, 250 N. W. 2d at 890.

Similarly, in *State v. Stewart,* 197 Neb. 497, 250 N. W. 2d 849 (1977), the court approvingly quoted the following language from the Supreme Court of Florida which, in *State v. Dixon,* 283 So. 2d 1 (Fla. 1973), was interpreting that state's death penalty provisions which are very similar to Nebraska's statutes.

> Review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case. No longer will one man die and another live on the basis of race, or a woman live and a man die on the basis of sex. If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great.

197 Neb. at 518, 250 N. W. 2d at 862.

The petitioners received meaningful review of their death sentence. Their contentions to the contrary or to the effect

that the standards of that review are vague and uncertain are unsound.

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CONCLUSION

For the reasons set forth, respondent respectfully prays that the writs of certiorari be denied.

Respectfully submitted,

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